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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 MAYA ZABAR,

4 Plaintiff,

New York, N.Y.

5 v.

18 Civ. 6657 (PGG)

6 NEW YORK CITY DEPARTMENT OF  
7 EDUCATION, et al.,

8 Defendants.

-----x

9 November 29, 2018

10 11:40 a.m.

11 Before:

12 HON. PAUL G. GARDEPHE,

13 District Judge

14  
15 APPEARANCES

16  
17 GLASS & HOGROGIAN, LLP  
18 Attorneys for Plaintiff  
19 BY: BRYAN D. GLASS

20 ZACHARY W. CARTER  
21 Corporation Counsel for the City of New York  
22 BY: SAMANTHA P. TURETSKY  
23 Assistant Corporation Counsel  
24  
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1 (Case called)

2 THE DEPUTY CLERK: Is the plaintiff ready?

3 MR. GLASS: Yes.

4 THE DEPUTY CLERK: Please state your appearances.

5 MR. GLASS: Good morning. Bryan D. Glass from Glass &  
6 Hogrogian, Zabar and I have Ms. Zabar here to my left.

7 THE DEPUTY CLERK: Defendant ready?

8 MS. TURETSKY: Yes. Samantha Turetsky for defendants  
9 through corporation counsel.

10 THE COURT: Please, be seated.

11 This is an action brought under the Americans with  
12 Disabilities Act, the State and City Human Rights Law, as well  
13 as Section 1983. I understand the plaintiff to be an English  
14 teacher who worked at the High School of Art and Design in  
15 Manhattan. The plaintiff alleges that in the summer of 2016  
16 she asked or began asking for certain accommodations due to  
17 conditions of anxiety and depression and the plaintiff also  
18 says she became a union representative at that time.

19 The plaintiff alleges that she suffered adverse action  
20 after raising her request for an accommodation and after  
21 becoming a union representative, and the adverse action she  
22 cites are numerous disciplinary letters which she claims were  
23 unfounded, as well as negative written evaluation reports,  
24 numerous negative written evaluations, and also poor ratings,  
25 ratings that she challenges as inaccurate.

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1           On September 7, 2018, disciplinary charges were  
2 brought against the plaintiff. I understand those to still be  
3 pending, or at least they were pending as of the time of the  
4 complaint.

5           I have received a pre-motion letter from the  
6 defendants in which they seek leave to file a partial motion to  
7 dismiss and the defendants contend, in their pre-motion letter,  
8 that portions of plaintiff's claims are barred by the statute  
9 of limitations while others fail to state a claim.

10           I am going to tell you this morning what my reactions  
11 are to the proposed motion. That is why I have a pre-motion  
12 conference requirement. It is so that I have an opportunity to  
13 share with lawyers, before any papers are filed, my views of  
14 whether the proposed motion is likely to be productive or not.

15           So, I would begin with the statute of limitations  
16 arguments as they relate to plaintiff's claims under the  
17 Americans with Disability Act for denial of a reasonable  
18 accommodation, hostile work environment, and retaliation.

19           The defendants contend that these claims are  
20 time-barred to the extent they relate to acts or conduct that  
21 took place prior to May 19, 2017.

22           I will assume, for purposes of today's discussion,  
23 that defendants are correct about the date and correct about  
24 the assertion that conduct or acts that took place before then  
25 cannot provide a basis for liability. However, even assuming

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1 that I were to rule in defendant's favor as to pre-May 19, 2017  
2 conduct, there would be discovery about those matters because  
3 they would constitute background evidence and, accordingly, I  
4 don't see how a motion to dismiss as to pre May 19, 2017  
5 conduct is going to advance the litigation in a significant  
6 way.

7 If the case proceeds to summary judgment and the  
8 parties cannot reach a stipulation as to whether pre-May 19,  
9 2017 conduct provides a basis for liability, then I would be  
10 called upon to resolve that issue. But, from a practical  
11 perspective, I don't see how a motion to dismiss as to pre-May  
12 19, 2017 conduct is going to significantly advance resolution  
13 of the parties' dispute.

14 With respect to claims brought under the State and  
15 City Human Rights Laws as against the Board of Education and  
16 Superintendent Rosales, the defendants argue that these claims  
17 are subject to dismissal because the plaintiff did not file a  
18 Notice of Claim as required under New York Education Law  
19 Section 3813.

20 Is there a dispute about whether plaintiff filed the  
21 required Notice of Claim, Mr. Glass?

22 MR. GLASS: No, we didn't file in this case.

23 THE COURT: So, accepting that as true, it seems to me  
24 that those claims are in fact subject to dismissal and  
25 plaintiff should consider whether they should be dropped at

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1 this point given defendant's arguments about the Notice of  
2 Claim.

3 The law appears to me to be clear that as to school  
4 districts and as to superintendents, notice of claim must be  
5 filed citing *Collins v. City of New York*, 156 F.Supp. 3d, 448  
6 at 460, (S.D.N.Y. 2016) Notice of claim required for claims  
7 "against any school district, board of education, board of  
8 cooperative educational services school, or any officer of a  
9 school district Board of Education, board of cooperative  
10 educational services, or school."

11 As to plaintiff's claim for retaliation in violation  
12 of the First Amendment, defendants argue that the 1983 claim  
13 premised on that allegation does not meet the standards for a  
14 Monell claim. As everyone here knows, in order to plead a  
15 Monell claim, a plaintiff is required to allege facts  
16 demonstrating that the alleged constitutional deprivation was  
17 the result of a policy, ordinance, regulation, or decision  
18 officially adopted or promulgated by the municipality. Based  
19 on my review of the complaint in its present form, it does not  
20 seem to me that a plaintiff has provided allegations that make  
21 out a Monell claim so I would recommend to plaintiff that they  
22 consider whether the Monell claim should be dropped.

23 There is also an argument about qualified immunity.  
24 The defendants argue that the 1983 claim should be dismissed as  
25 to the individual defendants with respect to conduct that took

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1 place prior to May 16, 2018 on a qualified immunity theory and  
2 essentially defendants' argument is that prior to May 16, 2018  
3 it was unclear in this Circuit whether speech that was engaged  
4 in, in the context of union membership or participation in  
5 union activities, was protected by the First Amendment. And  
6 defendants actually cite law holding that a speech made in the  
7 context of union membership was not protected by the First  
8 Amendment and, in particular, they cite *Weintraub v. Board of*  
9 *Education*, 593 F.3d 196 at 198 to 99 (2d Cir. 2010).

10 On May 16, to 18, in *Montero v. City of Yonkers* 890  
11 F.3d 386 at 402 (2d Cir. 2018), the Second Circuit held that  
12 when a person's speech in connection with union activities does  
13 not fall within the person's job responsibilities and addresses  
14 a matter of public concern, that person is speaking as a  
15 private citizen and is entitled to First Amendment protection.  
16 *Montero* at 890 F.3d 394.

17 So, the defendants contend that prior to the  
18 clarification of the law or the change in the law, I should  
19 say, represented in *Montero*, that the individual defendants are  
20 entitled to qualified immunity. Accepting defendants' argument  
21 for purposes of this case, I have returned to the concept I  
22 mentioned earlier that there are acts and conduct pled after  
23 May 16, 2018 which could provide the basis for the claim that  
24 plaintiff has brought.

25 So, in my view, a motion to dismiss is not going to be

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1 productive in terms of pushing a case towards ultimate  
2 resolution because the claim will survive, I suspect, as to  
3 conduct that took place post-May 16, 2018, even if I accept the  
4 argument that qualified immunity applies prior to May 16, 2018.

5 Next is the ADA claim for denial of reasonable  
6 accommodations. On this point I want to say that having  
7 reviewed the allegations of the complaint, it is not entirely  
8 clear to me that the plaintiff has provided enough factual  
9 allegations to make out a plausible denial of reasonable  
10 accommodation.

11 So, what are the factual allegations? There are  
12 allegations indicating that the plaintiff suffers from  
13 depression and from anxiety and there is also an assertion,  
14 although I don't think there has been a diagnosis, of  
15 post-traumatic stress disorder. Those conditions could provide  
16 a basis for me to find that plaintiff suffers from a  
17 disability. There are decisions in this district which have  
18 required a plaintiff to, in addition to alleging conditions of  
19 the nature that I have cited, that have required a plaintiff to  
20 plead facts that the condition, in question, has substantially  
21 limited one or more of the plaintiff's major life activities,  
22 citing *Andino v. Fischer*, 698 F.Supp.2d, 362 at 378 (S.D.N.Y.  
23 2010). Defendants have argued here that the plaintiff has not  
24 told us in the complaint what major life activities have been  
25 substantially limited by her alleged disabilities flowing from

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1 the psychiatric conditions she has alleged. Moreover, with  
2 respect to the request for reasonable accommodation, the  
3 complaint does not explain why it was necessary for the  
4 plaintiff to receive written rather than verbal instruction.  
5 So, there is a complaint that the plaintiff explained to her  
6 supervisors that it was necessary because of her psychiatric  
7 conditions for her to receive communication in written form  
8 rather than in verbal form but the complaint doesn't tell us  
9 why it was that it was necessary for plaintiff to receive  
10 communications in written form as opposed to verbal form  
11 because of her conditions.

12 So, what we have is a bare allegation that the  
13 plaintiff suffers from certain psychiatric conditions, no  
14 explanation or pleading as to how those alleged psychiatric  
15 conditions affect the plaintiff in her everyday life, in her  
16 major life activities, a request for an accommodation, that  
17 being that communication be in writing, but no explanation of  
18 why it was necessary given plaintiffs' psychiatric conditions  
19 for communications to be made in writing as opposed to  
20 verbally.

21 With respect to the retaliation claims alleged under  
22 the ADA and the State and City Human Rights Law, the defendants  
23 argue that there was a lapse in time between plaintiffs  
24 accommodation requests and the alleged retaliation and  
25 defendant seems to be calculating the time from the first

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1 moment that the plaintiff made a request for an accommodation.  
2 However, in the amended complaint paragraph 25, the plaintiff  
3 says that she requested the written communication accommodation  
4 throughout the 2016 through 2017 school year and throughout the  
5 2017 through 2018 school year.

6 In the amended complaint, the plaintiff pleads many  
7 alleged adverse actions that were taken against her during, for  
8 example, the 2017 to 2018 school year. Accordingly, accepting  
9 that there is a gap between the first request for an  
10 accommodation and the first adverse action that's pled in the  
11 complaint, the plaintiff has claimed that she was repeatedly  
12 requesting the written communication accommodation through both  
13 school years and that, one could infer from that, that her  
14 request for accommodation -- her continued request for  
15 accommodation in the 2017-2018 school year, those requests for  
16 accommodations were taking place at the same time that the  
17 alleged adverse actions were being taken against her in the  
18 form of disciplinary reports and poor evaluations.

19 The defendants argue that the plaintiff has not made  
20 out a claim for hostile work environment under the ADA and the  
21 State and City Human Rights Law because, according to  
22 defendants, plaintiff has not pled facts demonstrating that  
23 defendants' actions were severe and pervasive. The plaintiff  
24 has alleged many, many, many adverse actions as I have said in  
25 the form of disciplinary letters and poor evaluations. Putting

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1    them together, there is probably dozens of alleged adverse  
2    actions.  So, it does seem to me that there was probably enough  
3    here to meet, for pleading purposes, the threshold for  
4    pervasive.

5           There is also an argument made by defendants that a  
6    claim is not made out because the plaintiff points to hostility  
7    related to her request for an accommodation rather than  
8    hostility premised on her alleged disability and it's difficult  
9    for me to separate the two.  So, someone is requesting an  
10   accommodation due to their alleged psychiatric conditions and  
11   they are met with hostility, allegedly, when they make repeated  
12   requests for an accommodation.  I find it difficult to  
13   distinguish between hostility premised on the person's  
14   disability and the person's request for an accommodation due to  
15   their disability.  I see the two as quite intertwined.  And so,  
16   for purposes of a motion to dismiss, I suspect it would be very  
17   difficult for me to make the separation that defendants are  
18   seeking.

19           So, where do we go from here?  So, Mr. Glass, I'm  
20   going to give you two weeks to figure out whether you want to  
21   amend the complaint or I should say whether you want to amend  
22   the amended complaint to address what I have said.  It is  
23   entirely up to you whether you want to amend or not.  If you  
24   do, you will propose a second amended complaint within two  
25   weeks' time.  If the defendants want to proceed with a motion

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1 to dismiss after they see the proposed second amended  
2 complaint, they will send me a letter telling me that and  
3 proposing a briefing schedule that they have discussed with  
4 Mr. Glass.

5 So, Mr. Glass' letter and any proposed second amended  
6 complaint will be due by two weeks from today, which is  
7 December 13th, and then the City will tell me by December 27th  
8 whether they wish to proceed with a motion to dismiss, or I  
9 guess it could be styled opposition to Mr. Glass' application  
10 for leave to file a second amended complaint. However the City  
11 wants to style it I think we all understand what the substance  
12 of that motion to be.

13 Once we know where we are headed with respect to the  
14 motion practice, I will enter the appropriate order.

15 So, what remains is discovery, it is my belief that  
16 the case will survive in some form, even if the City chooses to  
17 proceed with its proposed motion to dismiss. So, in such  
18 cases, it is my practice to enter a case management plan  
19 because the case is going to survive, in some form.

20 The parties have submitted a proposed case management  
21 plan which seems reasonable to me. Accordingly, I will enter  
22 that plan --

23 MS. TURETSKY: Your Honor, if I may? Sorry to  
24 interrupt. The case management plan that was entered --

25 THE COURT: I understand. I am going to account for

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1 the dates.

2 MS. TURETSKY: Okay. Thank you.

3 THE COURT: As I was about to say, I will enter the  
4 parties' case management plan adjusted for the fact that we are  
5 holding the conference after the point that the parties  
6 submitted the plan so it will be adjusted -- the dates will be  
7 adjusted to reflect that fact.

8 Which brings me to my final point which is settlement.  
9 Is there any opportunity to settle the case before we get into  
10 the motion practice?

11 Mr. Glass, what is your perspective on that?

12 MR. GLASS: Yes, your Honor.

13 We are always open to discussing settlement.  
14 Sometimes it depends on the City's -- in fact there are several  
15 other cases pending against the principal in this case; one we  
16 have settled, there is another one that is in some settlement  
17 discussions so it is really going to become a -- it depends on  
18 the Board's position on this case if they're willing to  
19 discuss -- she is out of the school at the moment and so we  
20 need to understand what the City is willing to do on this case.  
21 But, I am always open to discuss terms.

22 Obviously, things may change during the course of the  
23 litigation. She has been reassigned pending charges which have  
24 not been pushed yet, they're still outstanding, so that also  
25 might precipitate some effect on the federal case.

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1           So, I would be happy to engage in mediation now if the  
2 City is willing to do that. These are always fluid cases when  
3 the teacher is still employed and in the system so we have had  
4 different settlements depending on what the person's desires  
5 are, where they want to teach, and I have settled many of these  
6 cases with the board over the years.

7           So, if Ms. Turestsky is receptive to early mediation  
8 we are always open to that. We need to find out where she is  
9 going to go at the end of the 3020A charges and if there will  
10 be some accommodation for what she has gone through.

11           THE COURT: So, should I understand from your remarks  
12 she is not currently in a classroom?

13           MR. GLASS: Yes.

14           What happened was, at the beginning of the school  
15 year, the Department of Education authorized her removal and  
16 she is, like, in a reassignment center at this point and she is  
17 not actively teaching. A lot of these cases do resolve often  
18 with -- I don't think she is going to be terminated based on  
19 the history here and often she will get a small penalty or may  
20 be exonerated and put back to that school. She probably  
21 doesn't want to return to that school. So, there are things to  
22 consider regarding what the Board would be willing to do to  
23 placing her going forward and the monetary losses she suffered.

24           So we have engaged in discussions. It may come  
25 through the 3020A process, it may come through this process.

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1 They may join together at some point, so.

2 THE COURT: What is the basis for the disciplinary  
3 charges?

4 MR. GLASS: It is what is pled in the complaint.

5 They wrote up a lot of -- all of a sudden she an  
6 incompetent teacher, she has disciplinary issues. I mean, this  
7 is a perfect teacher who taught at Stuyvesant High School until  
8 this principal took over and it has been a very hostile  
9 environment as from what you might get from the complaint.  
10 They have settled one of the cases with offering a substantial  
11 amount of money and retiring. She is not in a position to  
12 retire. We have a case with the chapter leader with the school  
13 right now which is in some discussions of and settlement and  
14 Ms. Zabar is similar to the chapter leader in figuring out  
15 where she would go and how we would sort this out.

16 THE COURT: Ms. Turetsky, is there any opportunity to  
17 settle the case or are we going to have to get into motion  
18 practice and discovery?

19 MS. TURETSKY: Your Honor, it's the defendant's  
20 position that all the cases discussed by the plaintiff just now  
21 are independently reviewed, they have no bearing one way or the  
22 other on the settlement potential of this specific case. At  
23 this point plaintiff has not made a settlement demand so I have  
24 nothing to respond to but I think it would be best for the  
25 defendant to move ahead with motion practice.

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1 THE COURT: Okay. So, what I am hearing, Mr. Glass,  
2 is that it might make sense for you to make a demand and see  
3 whether we can get the process moving but at least, absent  
4 that, we are going to need to move forward. So, I will enter a  
5 case management plan, we have set a schedule for the pleading  
6 and for any subsequent motion.

7 Is there anything else we can talk about now?

8 MS. TURETSKY: Your Honor, I ask that our time to  
9 answer is stated until after the motion to dismiss is decided,  
10 if we reach that point.

11 THE COURT: Yes. That's granted.

12 MS. TURETSKY: If I can just clarify two points?  
13 First that I guess we will proceed with discovery regardless of  
14 whether the motion practice is going on.

15 THE COURT: Yes.

16 MS. TURETSKY: Two points addressed. I understand  
17 your Honor's position, deciding whether to amend the complaint  
18 on the state law claims. I am not sure, we had made an  
19 argument that notice of claim is -- we understand notice of  
20 claim is required against Board of Education. It may not be  
21 required against some individuals and there is case law to that  
22 effect. That's why we didn't take out the State claim  
23 completely. I don't know if the Court had thoughts on that.

24 THE COURT: I do. I do.

25 So, it is clear to me that a notice of claim is not

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1 necessary as to a principal. However, it is my belief that it  
2 is necessary as to a superintendent. For that proposition I am  
3 relying on the Collins v. City of New York which I previously  
4 cited which is 156 F.Supp. 3d at 460 and reads, as follows:

5 "New York Education Law 3813 requires a plaintiff to file a  
6 notice of claim prior to initiating a lawsuit against a school,  
7 school district, board of education or education officer.  
8 Superintendents qualify as officers upon whom a notice of claim  
9 must be filed but principals do not."

10 So, it is on Collins that I am relying for the  
11 proposition that a notice of claim was necessary both as to  
12 Board of Education and as to Superintendent Rosales.

13 MR. GLASS: The other last point I want to clarify  
14 regarding the Monell claim, also involving the role of the  
15 principal, I believe we cited case law in our letter on page 4  
16 about whether the principal may in fact serve as a policy maker  
17 for purposes of a 1983 claim and we cited some cases that  
18 suggested that some courts have held that and so in deciding  
19 whether to, I understand again -- so, if the principal is the  
20 policy maker, it is possible that the Board of Ed could be  
21 liable on that basis and so that's why -- I don't know if the  
22 Court addressed that in its preliminary remarks.

23 THE COURT: I don't really have anything else to say  
24 on that. You know, obviously I haven't made any decisions as  
25 to any of the claims, I am just giving you my reaction to the

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1 letters that I have read. And if you believe that your  
2 allegations are sufficient as to the Monell claim, then you are  
3 welcome to persist in that. Based on what I have read so far,  
4 I have concerns about whether the pleadings, whether your  
5 amended complaint was adequate as to the Monell claim. You may  
6 disagree and if you do, you are welcome to persist in it. If  
7 you have additional allegations that you want to make in  
8 support of your Monell claim, you are welcome to do that, too.  
9 It is entirely up to you but I wanted to alert you at this  
10 point that I have concerns that the Monell claim, in its  
11 present form, is not sufficient.

12 MR. GLASS: I guess the only question, so the amended  
13 complaint that you granted us that would get filed, it is not  
14 required? Because it seems to me that if the department is  
15 going to maintain its position they're going to move anyway, I  
16 may as well just address the claims in the motion to dismiss  
17 unless they're agreeing that if I take some claims out they  
18 won't proceed. It seems for me a fruitless exercise for me to  
19 amend the complaint and delay things and I will just respond to  
20 the motion to dismiss in due course.

21 So, I guess the Court's suggestion is see if I can  
22 negotiate with the City to remove some of the claims and avoid  
23 the motion practice?

24 THE COURT: That's what I recommend.

25 MR. GLASS: Okay. Thank you.

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1 THE COURT: Anything else?

2 MS. TURETSKY: No, your Honor.

3 THE COURT: All right. Thank you, all.

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